

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

CASE NO. 1885-2006

IN THE MATTER OF THE WAGE CLAIM)

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Claimant

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**FINDINGS OF FACT;
CONCLUSIONS OF
LAW; AND ORDER**

vs.

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ROBIN'S ROOST INC., d/b/a JULIAN'S
PIANO BAR AND CASINO

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Respondent

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I. INTRODUCTION

On March 20, 2006, Riekana filed a wage and hour claim maintaining that the respondent owes him unpaid wages in the amount of \$767.00 for work performed beginning July 22, 2005, and ending August 6, 2005.

By letter dated April 7, 2006, the Wage and Hour Unit dismissed Riekana's claim on the basis that it was not filed within 180 days.

On April 26, 2006, Riekana filed an appeal, accompanied by an affidavit filed on behalf of Riekana by James W. Kephart, appealing the dismissal of Riekana's claim, maintaining that Riekana is an innocent, unsophisticated and unrepresented victim of the employer who was unaware of the requirement that he file his claim within a certain time period.

On May 16, 2006, the Wage and Hour Unit issued a redetermination dismissing Riekana's claim on the basis that it was not filed within 180 days. The determination advised Riekana that it would become final unless he filed an appeal by June 5, 2006.

On June 5, 2006, Riekana filed an appeal.

On July 13, 2006, the file was transferred to the Hearings Bureau. On August 1, 2006, the parties conferred by telephone for a scheduling conference. The parties agreed to proceed to hearing on September 7, 2006.

On September 7, 2006, the Hearing Officer held an in-person hearing in this matter in room 106 at the Butte-Silver Bow County Courthouse. Riekana was present. Tina Morin, Attorney at Law, represented the respondent. Dale Gamble, compliance specialist for the Wage and Hour Unit, appeared as a witness for the respondent. David and Robin Jordan were present and observed for the respondent.

Exhibits 1 through 45 were provided to the parties prior to the pre-hearing conference held on August 1, 2006. At the pre-hearing conference, exhibits 1 through 19, 23, 24, and 27 through 44 were admitted into the record without objection. Exhibits 20 through 22 were admitted into the record over the respondent's objection that they are hearsay. The respondent objected to the admission of exhibits 25, 26 and 45 on the basis that they are hearsay. Riekana advised during the pre-hearing conference that he intended to call the author of those documents as a witness at the hearing. A ruling on their admissibility was delayed until the hearing. At the hearing on September 7, 2006, Riekana did not call the author of those documents as a witness. The respondent renewed its objection to their admission into the record. They were excluded from the record on the basis that they are hearsay.

Exhibits 46 through 277 were offered by Riekana. The respondent objected to the admission of all of them on the basis that they are hearsay and not relevant. Riekana withdrew exhibits 46 through 257 but offered exhibits 258 through 277 to show a historical relationship with the respondent. The exhibits demonstrate their historical relationship but are excluded from the record on the basis that they are not relevant.

Exhibits 278 and 279 were proposed for admission by Riekana and admitted into the record without objection.

During the hearing, the Hearing Officer took administrative notice of Mont. Code Ann. § 39-3-207(1) and Mont. Code Ann. § 27-2-409

II. ISSUE

Whether Riekema filed a timely claim as defined by Mont. Code Ann. § 39-3-207(1).

III. FINDINGS OF FACT

1. Riekema alleges that he was employed by Robin's Roost, Inc., d/b/a Julian's Piano Bar from July 22, 2005, through August 6, 2005. He alleges that he was offered pay in the amount of \$6.50 per hour and that he was not paid for all of his work.

2. On several occasions between July 22, 2005, and August 6, 2005, David Jordan gave Riekema meals to pay him for work he was doing. Between August 6, 2005, and March 16, 2006, Riekema talked to Robin Jordan on a number of occasions about pay. Jordan consistently assured him that he would be paid.

3. During the first week of March, 2006, Riekema was in the establishment and Jordan bought him several drinks. Riekema again asked about getting paid. Jordan assured him that she would make it right with him and suggested he talk to David Jordan.

4. On March 16, 2006, Riekema talked to David Jordan and asked about the pay he believed he had coming. Jordan told him he would not be receiving any pay.

5. On March 16, 2006, Riekema completed a claim form for unpaid wages and submitted it to the Wage and Hour Unit. The Wage and Hour Unit received the claim form on March 20, 2006.

IV. DISCUSSION

Mont. Code Ann. § 39-3-207(1) indicates that a complaint related to unpaid wages must be filed within 180 days "of default or delay in the payment of wages."

The question arises: What action tolls the running of the statute of limitations. The law indicates that it is the day of default *or* delay, not the last day of employment, although that could be the date of delay. It is significant that the law does not say the day of default *and* delay.

The rules of statutory construction require that the language of a statute be construed according to its plain meaning. *Lovell v. St. Comp. Mut. Ins. Fund* (1993), 260 Mont. 279, 860 P.2d 95. Had the legislature intended the result the respondent seeks, it would have utilized language in subpart 1 that would tie the overarching 180-day limitation to a triggering event such as the last day of employment. For example, the legislature could have said that the employee must file a wage claim within “180 days of default or delay in payment or within 180 days of the date the employee last worked.” The legislature did not do so and the hearing officer is not at liberty to insert such a notion in the statute when there is no language to support it.

The doctrine of equitable tolling arrests the running of a statute of limitation while a claimant reasonably and in good faith pursues one of several possible remedies. The claimant must meet three criteria: (1) timely notice to the respondent within the applicable statute of limitation; (2) lack of prejudice to the respondent in gathering evidence to defend against the claim; and (3) good faith and reasonable conduct by the claimant in filing the claim. *Sorenson v. Massey-Ferguson, Inc.* (1996), 279 Mont. 527, 927 P.2d 1030, 1032; **citing** *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 208, **subsequent appeal at** *Chance v. Harrison*, 272 Mont. 52, 899 P.2d 537(1995).

In this situation the date of delay and the date of default or last cause of action are not the same. Riekema’s alleged last day of work was August 6, 2005, which was not a fact in dispute. That is the date of delay rather than the date of the last cause of action, since he apparently was not paid any potential wages at that time. His expectation of an equitable resolution of potential wages owed arose at that time and continued until March 16, 2006, when Jordan told him he was not going to pay him. The last cause of action, or date of default of the payment of any potential wages was, therefore, March 16, 2006. In this matter, the date of default, or last cause of action, not the date of delay, tolled the running of the statute of limitations.

The facts reveal that Riekema asked for his wages on a number of undisclosed dates and was assured he would be paid. This satisfies the requirements of subpart (1) of the doctrine of equitable tolling. There is no evidence that the respondent has been prejudiced in gathering evidence by the delay in filing the wage claim. It was not until March 16, 2006, or 222 days after Riekema’s alleged last day of employment, that Jordan told him he would not be paid. Prior to that date, Riekema believed he would be paid and was encouraged to believe that. When Riekema was finally told that he would not be paid, he promptly filed a claim for unpaid wages. Therefore, Riekema displayed good faith and reasonable conduct in filing the claim. It was not

until March 16, 2006, that all factors necessary for accrual of the claim existed.

V. CONCLUSIONS OF LAW

I. Riekena filed a timely claim.

VI. ORDER

This matter will be set for a hearing on the merits following a scheduling conference.

Dated this 25th day of September, 2006.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID H. FRAZIER
DAVID H. FRAZIER

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.